

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

ARAMARK SPORTS AND ENTERTAINMENT, INC.,
a wholly owned subsidiary of ARAMARK CORPORATION¹

Employer

and

Case 36--RC--5997

UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 555, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All concession employees employed by the Employer at the Oregon Convention Center facility; excluding all other employees, catering employees, office clerical employees, employees represented by other labor organizations, guards and supervisors as defined in the Act.

¹ The Employer's name appears as corrected at the hearing.

² Both parties filed briefs, which have been considered.

Since July 1, 1999 The Employer has had a contract with the Metro Entertainment Recreation Complex (MERC) in Portland, Oregon to manage food and beverage operations for all of the buildings within MERC's responsibility. This includes the Oregon Convention Center (OCC); the Exposition Center (the Expo); the Portland Center for the Performing Arts (PCPA), which includes three proximate, but separate, buildings; and the Civic Stadium (the Stadium). Petitioner seeks a unit of all concession employees located at the OCC; the Employer contends the appropriate unit must include concession employees at all four venues. The catering employees are already represented by another non-intervening labor organization. The Employer also contends that stand managers and assistant stand managers are supervisors within the meaning of Section 2(11) of the Act and must be excluded from any unit found to be appropriate. In addition, there is an issue as to the voting eligibility formula, since the hours for concession employees are variable and somewhat sporadic.

The OCC appears to be primarily a convention center and is operated on a continuous, year-round basis, in Northeast Portland, "across The river" from downtown Portland. All of the facilities are located in the metropolitan Portland area. The most distant facility, the Expo, is approximately 7 miles from the PCPA, which is located in downtown Portland. The PCPA is approximately two miles from the OCC³. The Stadium is also within two miles of the OCC. The PCPA is a performing arts center, with three buildings (auditoriums and theaters within a few blocks of each other) in downtown Portland. PCPA is a somewhat seasonal operation, with less activity during the summer months than the rest of the year. Expo is a show and exposition center, with most of its activities concentrated in the winter months. The Stadium is an outdoors athletic stadium, which is primarily used for a AAA baseball team, during the summer months. The Employer utilizes employees to operate the food and beverage concession at all four locations.

The overall manager for the MERC operations is group manager Art Fortuna. Reporting to Fortuna are two general managers, Dan Butler and Bruce Lee. Lee has responsibility for the Stadium and the Expo, which are generally summer and winter active, respectively. The record does not reflect any site-specific manager for the Stadium or Expo.⁴ Butler is responsible for the OCC and the PCPA and has one manager at each reporting to him⁵. Loren Perry is the manager for the PCPA. Brian Joerg is the public foods manager for OCC, i.e., the on-site manager for the OCC concession employees.⁶ The Employer has a centralized human resources department for all facilities, located at OCC. All non-represented employees have a common benefit program, wage structure and are subject to the same employment policies, such as probationary periods, etc. All employees are paid from the Employer's home offices in Philadelphia. All are provided with a uniform, which varies slightly from venue to venue, but is essentially the same basic uniform.

³ The record does not reflect the distance from OCC to Expo. I take administrative notice that the distance is about 6-7 miles.

⁴ It appears that the seasonal nature of these two facilities does not generally overlap and that one individual can manage both facilities, as they are not generally in heavy use at the same time.

⁵ There is a third manager for catering at OCC, but the employees in that function is not included in any proposed unit.

⁶ I do note that Mr. Butler makes frequent appearances at OCC and PCPA while the concessions are in operation.

The employees in question operate various food and beverage stands at the OCC and other facilities. The individual stands offer specific menus, which vary from stand to stand, depending on the facility and the stand. Some offer pizza, others Chinese food, and others hot dogs, etc. Beer is served at certain locations, but not all of them. The employees in question prepare the food to a limited degree, serve the customers and collect payment for the purchases. The concession employees do not generally cook the food, such as the Chinese menu or the pizza; they just keep it hot and serve it. For example, the pizzas are prepared by catering employees in a kitchen area; the stand workers only bake it in an oven. Sandwiches are also prepared by concession workers, at the order of the customer. Beer is served at some stands and is poured by concession workers.⁷ The menu offerings and number of stands vary from location to location and also depend on the type and size of event at the specific location. The individual stands at the OCC have a “stand manager” and from 4-10 stand workers. There may be two stand managers at the larger stands. The stand managers report to Joerg at OCC and to Lee at Expo and the stadium. PCPA is operated in a slightly different manner⁸, but the stand managers there report to Perry. There are no assistant stand managers at OCC or PCPA.

Concession employees are hired for a specific “home” location such as the Stadium, OCC, PCPA or Expo. Employees for OCC are usually interviewed by Joerg, Butler or the human resource manager. There are very limited exceptions to the interview process⁹. Butler has to approve all OCC hires. Applicants are informed that it is desirable to be available for work at the other locations when there is a demand, but it is not a requirement of employment. The number of employees utilized for a given event at any of the four locations is dependent on the nature and size of the event in question. The staffing is variable; for OCC, the needs are generally determined by Joerg in consultation with stand managers and his own evaluations. The employees “homed” at the OCC are given first opportunity to work the available OCC shifts. If a large event cannot be completely staffed by the OCC-homed employees, employees from other the other venues will be notified of the work opportunities and they may volunteer. This notification can be by word of mouth, or notices on bulletin boards; if all else fails, personal phone *requests* will be made to fill the openings. This procedure also applied in similar fashion to fill vacancies at other venues: First the “home” employees, then volunteers elsewhere, then phone calls. Concession employees’ employment can be characterized as somewhat voluntary since they do not have to accept offered shifts, but if they decline enough times, the Employer will just cease calling them for work.¹⁰ There do not appear to be any adverse consequences for employees who reject work opportunities at locations other than their home location. Each worker uses an electronic card to check in at their specific location so the Employer can allocate their costs to that specific location for internal accounting processes.

⁷ These are identified as “beer pourers”; all employees serving alcohol must have the appropriate license. The Employer estimates that most of its employees have the license when they are hired.

⁸ Concession stands in an arts performance setting offer different menus and have different hours than other locations (e.g., intermissions).

⁹ The only one in the record was a referral of a past stand manager who was hired in as a stand manger.

¹⁰ There is no penalty for turning down proffered work, but if an employee declines frequently the Employer will just cease using them as the Employer obviously needs employees to perform the work and will utilize those who will accept work opportunities. The record shows that if an employee does not accept work at least once within a 45-day period, they will be dropped.

Since OCC and PCPA have less of a seasonal nature than the other locations, the employees homed at OCC tend to work most of the available hours at OCC. Since July 1, 1999, the OCC "homed" employees have worked in excess of 93% of their hours at OCC, the remaining 7% at the other facilities. The PCPA-homed employees work a similar high percentage of the available hours at PCPA. The Expo employee worked about 0.5% of their hours at OCC, the PPAC employee about 3%. The Stadium employees work approximately 11% of their worked hours at OCC, but this percentage is skewed by the high number of hours worked there by two Stadium-homed employees. It appears that approximately 85% of the available hours at OCC are worked by OCC-homed employees; about 15% is worked by non-OCC employees.

OCC employees are generally hired and interviewed by the OCC management staff, with the approval of Butler. OCC employees are subject to disciplinary actions and counseling through the management staff at the location where they happen to be working. Due to the large percentage of hours worked at OCC by the OCC employees, as a practical matter this result in their supervisory interactions being limited largely to the OCC location.

As both parties recognize, a single plant or location is considered presumptively appropriate unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Dixie Bell Mills*, 139 NLRB 629, 631 (1962). To determine whether the presumption has been rebutted, the Board considers such factors as centralized control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions and working conditions; degree of employee interchange; geographic proximity; and bargaining history, if any. *New Britain Transportation Co.*, 330 NLRB No. 57 (1999) and cases cited therein.

The Employer does have centralized control over personnel and labor relations policies, including accounting, personnel records, payroll, wages and benefits and over more formal disciplinary matters. There are no central written personnel policies or employee manuals, and what training is required is on-the-job. However, centralized control over personnel and labor relations, standing alone, is not sufficient to overcome the single-location presumption where the evidence demonstrates significant local autonomy. *New Britain Transportation*, supra. The record demonstrates that the managers at each of the facilities involved have significant control over daily labor relations.¹¹ At OCC, Brian Joerg makes decisions concerning staffing, discipline, hiring interviews and recommendations, and routine problems encountered by the concession workers at OCC. The respective managers at PCPA and the stadium and Expo have similar autonomy. Training is minimal, but occurs on-site while working at a particular stand.

While there is no work assignment from a central pool, there is a small degree of commingling of employees because individuals from other locations do volunteer for work assignments at OCC and vice-versa. There is no record evidence showing a permanent change in "home" locations for concession employees.¹² While all employment opportunities are somewhat voluntary as described above, the opportunities to work at a location other than the home facility are clearly more voluntary than a normal home assignment. Such voluntary interchange is given less weight in determining if employees from different facilities share a community of interest. *D&L Transportation*, 324 NLRB 160, 162 at fn. 7 (1997). The record shows some voluntary interchange but it appears to be at a relatively low level. I note that

¹¹ I do note that Lee is the responsible manager for both Expo and the Stadium.

¹² Concession employees usually choose a particular home location to suit their own preferences and needs, although there is relatively little difference in the type of work involved.

where the Board has found interchange to be a significant factor in overcoming the single-facility presumption, that the interchange levels are much higher than the instant situation. In *Purolator Carrier Corp.*, 265 NLRB 659 (1982) over 50% of the work force was split between two locations. In *Dayton Transport Corp.*, 270 NLRB 1114 (1984) there were 425 (in a unit of 87) significant temporary transfers between two locations in a one-year period.

The OCC is located between approximately two and seven miles from the other facilities. Employees generally choose one of the facilities for a home base based on the desirability of the facility, ease of commuting, parking, and other such factors. There is no bargaining history, but another labor organization does represent the catering¹³ employees located at the OCC.

In sum, I find that the evidence presented does not establish that the OCC is so functionally integrated with the other facilities that OCC has lost its separate identity.¹⁴ OCC-homed concession employees work 93% of their hours at that location; only 15% of the OCC hours are worked by outsiders. There is an indentifiable group of co-workers, and a manager separate from all other facilities. OCC concession workers are hired for work at OCC, and expected to work there regularly with an understanding they may volunteer for other locations if they so desire. Basically, they have right of first refusal. There is not one massed pool of employees that is used for all four locations; rather, there are specific pools of employees for each location, who can then fill overflow work on a *purely voluntary* basis. There is also moderate geographic separation, and some differences in work availability. In essence, with the expectation of administrative services and the employee interchange, the facilities operate in independently of each other, particularly at the concession level. Accordingly, I shall direct an election in the single facility.

The Employer contends that stand managers and assistant stand managers are supervisors within the meaning of Section 2(11) of the Act and therefore must be excluded from any unit. The Petitioner asserts they are employees and should be included in the Unit. Assistant stand managers are utilized only at the Stadium and Expo locations, so we need not determine their status here. The stands are manned by anywhere from four to twelve stand workers and one or two stand managers, depending on the expected volume of business. The stand managers are considered the managers on site by the Employer. The stand manager is responsible for all accounting and inventory functions. The stand manager opens the stand prior to the appearance of the public and makes sure all necessary items are in place, and does an inventory, both at opening and closing of the stand. The stand manager assigns the stand workers to individual functions, such as dispensing certain food items, cash register etc., but the duties of the stand workers are routine and unskilled. The stand managers also evaluate possible staffing needs and make recommendations to Joerg or Lee. During an event, stand managers can assess their individual staffing needs and request additional stand employees or decide they have too many. Stand managers then notify Joerg or Lee of the staffing situation,

¹³ Catering activities take place primarily at OCC, with small amounts taking place at the other facilities, performed by the OCC catering staff.

¹⁴ The cases cited by the Employer in this regard are distinguishable. *Capitol Coors Co.*, 309 NLRB 322 (1992), involved a petitioner who was seeking a multiple location unit. There the test was whether the multi-plant unit petitioned for was *an* appropriate unit. Here the test is not whether the multi-location unit is appropriate, or more appropriate, but is whether the single-plant unit petitioned for is *an* appropriate unit. In *Neodata Product/Distribution*, 312 NLRB 987 (1993), the employee interchange was less than the instant case, but the Board found that the two facilities in question were fully functionally integrated, with frequent and daily contact between the two facilities, as opposed to the separate nature of the four facilities in this case.

or they directly contact¹⁵ other stand managers and attempt to obtain additional employees from an overstaffed stand, or to shift their excess workers to another stand. Swapping at this level is done without approval from Joerg or Lee, although they can be made aware of the situation and can actually make the swapping decisions. It does not appear that stand workers are swapped from one venue to another during concurrent events.

Stand managers do not have the authority to hire or fire employees, but can recommend either action. There is no record evidence of a stand manager recommending a termination. The stand managers can recommend hiring and in one instance, a stand manager's hiring recommendation was followed without an interview by higher management.¹⁶ On the other hand, much of the Employer's hiring is done by word of mouth or recommendations from current employees. With the one exception noted above, all applicants are interviewed by managers higher than stand managers. Stand managers do have some disciplinary authority. They can routinely counsel stand workers about minor items such as timeliness, uniforms and similar items. It is not clear if such counseling is noted in any personnel files or has any impact on the tenure of employees, for instance through a progressive discipline system. There is no evaluation system in place. In the event of serious misconduct, the stand managers can remove an employee from the stand, pending an investigation by the management. The only example provided was one instance where a stand manager noticed a stand worker drinking beer on a break (alcohol consumption by employees is flatly prohibited) and removed that worker from the stand until Joerg could deal with the situation. Apparently, the individual had a recurrent problem and was terminated. Joerg did not testify, so the record does not show if he relied solely on a recommendation of the stand manager, or merely received a report and acted on the report, or if he independently investigated. There are counseling forms utilized by the employer, but the Employer did not present any evidence that these forms had been utilized by stand managers.¹⁷

Stand managers are expected to direct the operations of the individual stand and theoretically do not participate in the actual work of the stand. However, it is apparent that stand managers can and do perform ordinary stand work due to the time pressures of the business. Stand managers do schedule the breaks of stand employees and assign their functions. Stand managers are paid 30% more than stand workers, but are still hourly employees, in contrast with the salaried status of Joerg and Lee. There are routine manager meetings, but not all stand managers attend these meetings.

Section 2(11) of the Act defines a "supervisor as:

The term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

Section 2(11) is interpreted in the disjunctive and the possession of any one of the authorities makes an employee a supervisor. *Pepsi-Cola Co.*, 327 NLRB No. 183 (1998). The

¹⁵ The stands have radios or intercoms, which are utilized to contact other stands or the managers.

¹⁶ This involved an ex-stand manager from the predecessor employer.

¹⁷ Other than a sample, the only other counseling form in the record was one where a stand manager was being criticized (by someone higher in the chain of command) for a cash shortage at her own stand.

burden of establishing supervisory authority rests upon the party asserting that status. *Benchmark Mechanical Contractors, Inc.*, 327 NLRB No. 151 (1999).

Stand managers have the authority to counsel and discipline employees, they sometimes transfer employees from one location to another without prior approval, they participate in staffing discussions, and they assign work tasks to individual employees. Notwithstanding these authorities and responsibilities, there is no indication any of the foregoing requires independent judgment. The tasks of the employees are simple, routine and repetitive. Stand managers are essentially the only employee representatives in the stands for most of a given event, but the general managers walk around the given location during an event to observe the stands and business in general; while not routinely participating in the operation of the stands, they are available as managers. They earn significantly more than regular stand workers do. The assignment of work tasks within a given stand, or the transfer is of a person from a slow stand to a busy stand,¹⁸ calls for something considerably less than independent judgment, and is not supervisory authority. See *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); *Byers Engineering Corp.*, 326 NLRB No. 125 (1997). The exercise of disciplinary authority appears to be limited to general counseling about appearance and procedures, without any evidence of adverse consequences. There was evidence that one stand manager had difficulty with an employee concerning alcohol, and pulled him off duty, but this appeared to be limited to one occasion for a flagrant violation, akin to the common example in the cases of a leadman sending an inebriated employee home, pending review by higher authority later - an action lacking independent judgment. The party asserting supervisory status has the burden of establishing that status. The Employer is contending these individuals are supervisors, and has not met its burden of providing probative evidence in support of that contention. I find that the stand managers at OCC are the equivalent of "leads" and are employees included in the Unit. The stand managers do not meet any of the enumerated criteria for supervisors listed in Section 2 (11) of the Act. The higher pay is not a statutory indicia, only a secondary factor.

There is an issue concerning voter eligibility. Petitioner argues that a minimum "four hour weekly average" standard be applied in this situation.¹⁹ The employees at OCC must accept work at least once within a 45-day period in order to remain an "active" employee. The Board has been flexible and fashioned eligibility formulas to fit the circumstances. There are special formulas for the construction industry²⁰, entertainment industry²¹ and on-call teachers²². Formulas are used as a "bright-line" test to allow those with a significant continuous interest in employment to vote, while excluding those with only limited involvement, or someone who just happened to work for the first time during a "normal" eligibility period. It appears that the work can be very sporadic and I find that a four-hour per week requirement over a short period would disenfranchise too many employees with a community of interest. Given the nature of the concession stands and the sporadic nature of employment, and the pattern of hours worked²³, I

¹⁸ There is no indication they can force a transfer, only that they can arrange one by mutual agreement with another stand manager.

¹⁹ See *Davison-Paxon Corp.*, 185 NLRB 21 (1970) for a discussion of the four-hour-per week standard applied to on-call employees.

²⁰ *Steiny & Co.*, 308 NLRB 1323 (1992)

²¹ *Julliard School*, 208 NLRB 153 (1974), *DIC Entertainment, L.P.*, 328 NLRB No. 86 (1999)

²² *Berlitz School of Languages*, 231 NLRB 766 (1977)

find that any employee who is considered an active employee based on the 45-day formula (ending with the last completed payroll period prior to the issuance of this Decision)²⁴ AND has worked EITHER at least 50 hours in the period 2/1/00 - 4/30/00, OR 100 hours in the period 11/1/99 - 4/30/00, shall be eligible to vote. In this manner, I will exclude those few who have minimal employment experience and/or continuity with the Employer, or who do not meet the Employer's "active" requirement, while including those employees who have a substantial and continuing interest in employment.

There are roughly 50 eligible employees in the Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who have worked at least one shift in the 45 days preceding the last payroll period completed prior to 3/24/00, AND have worked at least 50 hours at OCC in the period 2/1/00- 4/30/00 OR 100 hours at OCC in the period 11/1/00 - 4/30/00. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Food & Commercial Workers Union, Local 555, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed with the Officer-in-Charge who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Portland Subregional Office, 601 SW Second Avenue, Suite 1910, Portland, OR 97204-3170, on or before May 31, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation

²³ Based on the detailed work records in the exhibits.

²⁴ Regardless of where the "active" - qualifying hours might have been worked.

should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by June 7, 2000.

DATED in Seattle, Washington, this 24th day of May 2000.

/s/ PAUL EGGERT

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